84-870

NO.

Office-Supreme Court, U.S.
FILED
NOV 30 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1984

LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT AND JOHN F. SCHWEGMANN,

Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee

On Appeal from the United States Court of Appeals for the Fifth Circuit

APPENDIX TO JURISDICTIONAL STATEMENT VOL. I—APPENDIX A

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APPENDIX "A"
OPINIONS BELOW

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Plaintiff-Appellee,

v.

LOUISIANA PUBLIC SERVICE COMMISSION,
Thomas E. Powell, George J. Ackel, Ed Kennon,
Louis Lambert and John G. Schwegmann, Jr.,

Defendants-Appellants.

No. 83-3494.

United States Court of Appeals.
Fifth Circuit.

Oct. 11, 1984.

Appeal from the United States District Court
for the Middle District of Louisiana.

Before GEE, RANDALL and JOHNSON, Circuit Judges.

RANDALL, Circuit Judge:

The Louisiana Public Service Commission appeals a modified preliminary injunction of the District Court for the Middle District of Louisiana requiring the Louisiana Public Service Commission to grant an increase in intrasate telephone rates sufficient to allow the South Central Bell Telephone Company to cover increased operating expenses of $40,506,000 resulting from the implementation

of depreciation rates and methodologies prescribed by the Federal Communications Commission. The district court issued its order upon finding that the Louisiana Public Service Commission had failed to comply with an earlier, non-dollar specific preliminary injunction requiring the Louisiana Public Service Commission to utilize the federally mandated depreciation practices. Because we conclude that the district court acted within its authority and discretion in issuing the modified injunction, we affirm.

I. BACKGROUND

A. Basic Principles of Public Utility Ratemaking.

Because this case involves the role of depreciation rates and methodologies in determining the revenue requirements of a regulated utility, we begin by briefly reviewing certain basic principles of regulatory ratemaking.[1] Public regulatory commissions have the responsibility of ensuring that regulated utilities on the one hand do not receive monopolistic returns but on the other hand do recover sufficient revenues to pay legitimate expenses and to provide a rate of return on investment that will compensate present investors and attract new capital when needed. In determining a rate structure that will adequately meet a utility's prospective revenue requirements, a regulatory commission makes predictions based on the utility's revenues, expenses, and investments in some selected previous year, called the "test year." Although

[1] For a more comprehensive discussion of agency ratemaking and associated problems, see generally J. Bonbright, Principles of Public Utility Rates (1961); Foster, *Fair Return Criteria and Estimation*, 28 Baylor L.Rev. 883 (1976); Schwartz, *Inflation and Utility Rate Regulation*, 4 Utah L.Rev. 89 (1982). For a description of ratemaking in Louisiana, see *South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 373 So.2d 478 (La.1979); Defendant's Exhibit 1, at 1-9.

the normal costs of service incurred by a utility will usually increase from year to year, the test year serves as a reasonably acurate basis for estimating future operating expenses and return requirements because the increasing costs generally will be offset, at least theoretically, by additional revenue supplied by new customers. Once the cost of service for the test year is adjusted for any extra ordinary change expected to occur in the upcoming year, the regulatory commission is able to calculate tariffs relying on test year figures as representative of future revenue requirements.

A utility's "rate base" is the total amount of its investments in providing its service, including its investment in working capital for the test year. The utility's earnings, or the amount returned on investment, is its revenues minus its expenses. The utility's rate of return is therefore determined by dividing the utility's total investment by its earnings. Thus, an increase in a utility's expenses requires a corresponding increase in a utility's revenues in order for the rate of return to remain constant. Similarly, an adjustment in the utility's rate of return necessitates a corresponding adjustment in the utility's revenues, assuming expenses and investment remain the same.

In determining the expenses incurred by a utility in the test year, regulatory agencies use principles of depreciation accounting. Under these principles the cost of an asset having a useful life of more than one year is not counted as an expense in the year incurred. Rather, the costs are capitalized and spread over that period of time during which the item is in service. The costs of the asset are then recouped from future ratepayers through depreciation charges. A change in the depreciation rate, therefore, results in a change in the expenses incurred during the first

years of the asset's useful life, although of course, as long as the prediction of useful life is accurate, the total amount of expenses incurred over the asset's useful life would remain the same. The purpose of depreciation accounting is to match costs with the revenues they generate. Expenditures for long-lived assets are thought to be more properly charged over the various periods in which the assets are useful in the production of revenues. *See generally* Docket No. 20,188, 83 F.C.C.2d 267, 270-71 (1980).

B. FCC Regulations on Depreciation.

Regulatory power over the telecommunications industry is exercised by both federal and state governments. In 1934, Congress enacted the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, "to make available, so far as possible ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. To achieve this goal, Congress gave the Federal Communications Commission (FCC) regulatory authority to establish depreciation practices and to require the keeping of prescribed accounts.[2] The FCC's power, however, was

[2] 47 U.S.C. § 220(a)-(b). Section 220(b) provides:

> (b) The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed

carefully curtailed not to extend to intrastate communications.[3] Under the Communications Act, state regulatory commissions, such as the Louisiana Public Service Commission, retain the authority to regulate intrastate rates, facilities, and practices of the telecommunications industry. *See* La. Const. art. IV, § 21; La.Rev.Stat.Ann. § 45:1161, *et seq.*

In 1980, after seven years of study, the FCC adopted the "remaining-life" and "straight-line equal life group" (SLELG) depreciation methods. Docket No. 20,188, 83 F.C.C.2d 267 (1980), *on reconsideration,* 87 F.C.C.2d 916 (1981). According to the FCC, use of these depreciation methods would "calibrate more closely the flow of revenues with the recovery of capital," 83 F.C.C.2d at 281, and thus provide communications utilities with additional cash flow needed to meet the construction requirements of a rapidly changing technology.[4] The FCC acknowledged that use of

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(Footnote 2 continued)

> percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

[3] Several provisions of the Act preclude the FCC from exercising jurisdiction over intrastate communications. Section 152(b) provides that "nothing in this chapter shall be construed ... to give the [FCC] jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication." *See also* 47 U.S.C. § 221(b).

[4] The "remaining-life" method of depreciation replaced the "whole-life" method. Although both are used in connection with straight-line depreciation, remaining life more accurately reflects the current experienced life of an asset. The FCC explained:

the accelerated depreciation methods would result in increased revenue requirements over the short term, but stated that "the relative size of the increment will be repaid many times over in future years as the ability of regulated telephone companies to provide '... rapid, efficient ... communication service with adequate facilities at reasonable charges is enhanced.' "[5] *Id.* For similar reasons, the FCC

(Footnote 4 continued)

> The essential difference between whole-life and remaining-life depreciation rate calculations is that the former attempts to determine that annual charge that would be appropriate in the event that the current predictions of whole-life (estimated future life added to current experienced or expired life) were in fact correct. The remaining-life process proceeds on the premise that the current prediction of remaining or prospective life is correct and attempts to allocate any unrecovered or unallocated costs over that time period. That is, the original cost less accumulated reserve, or net unrecovered cost is divided by the prospective remaining-life in order to determine the annual future charges to expense.

83 F.C.C.2d at 289. The SLELG procedure replaced the straightline vintage group (SLVG) method. The essential difference between these two is that SLELG breaks equipment down into smaller subgroups in calculating useful life. Under SLELG, therefore, estimates of useful life are in the aggregate more accurate.

[5] The FCC further stated:

> All accounting measures are important, but in the case of capital intensive industries the measure of depreciation becomes even more important. On the whole such industries are frequently regulated and annual revenue requirements reflect both the current measure of the consumption of capital (depreciation) and a provision for the costs (return requirement) of the capital still unrecovered through depreciation charges. If depreciation policies or practices were to be determined solely with concern for the level of revenue requirements, the actual measure of depreciation might be misstated. Such distortion of the measure of depreciation would in turn lead to a misstatement of the results of operations for the period and would also misstate the relative

in 1981 ruled that station connections were to be expensed immediately instead of capitalized and recovered over their useful life through depreciation. Docket No. 79-105, 85 F.C.C.2d 818 (1981).

In April 1982, the FCC, in response to a petition for clarification submitted by the National Association of Regulatory Utility Commissioners (NARUC), declared that its prior rulings on depreciation methodologies and sata-tion connections were not applicable to the states. 89 F.C.C.2d 1094 (1982). Refusing to repudiate forty years of administrative practice and court precedent, the FCC ruled that, "when state regulation is reconcilable with federal policies or rules, there is no occasion for us to override state agency actions in furtherance of legitimate state regulatory objectives."[6] *Id.* at 1108.

(Footnote 5 continued)

> position of the enterprise as shown by its balance sheet. If such distortions were perceived by present and potential investors and were deemed to be deleterious to the safety and recovery of their investment, they in turn would likely demand a higher return on their funds. Consequently, a failure to properly measure by understating these costs would, in the long run, probably be offset by higher costs of capital without any real avoidance of the ultimate need to provide full recovery for the capital.

83 F.C.C.2d at 271-72.

[6] The FCC in addition stated:

> We have always given special consideration to the needs and views of state commissions in developing accounting and depreciation rules and most State commissions have chosen to follow most accounting and depreciation rules prescribed by this Commission. Departures have nonetheless occurred from time to time.
>
> This Commission has never attempted to prevent any State commission from departing from our accounting and

Following the FCC's preemption ruling, on June 7, 1982, the American Telephone and Telegraph Company (AT&T), on behalf of itself and associated Bell System Operating Companies, filed a petition for reconsideration. On the same day, General Telephone Company of Ohio sought a "declaratory ruling" ordering the Public Utilities Commission of Ohio to use the same depreciation rates for intrastate purposes as had been prescribed by the FCC. After a joint reply period for the two petitions, the FCC, in a "Memorandum Opinion and Order" released on January 6, 1983 (Preemption Order), reversed itself and declared that its "depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rules." 92 F.C.C.2d 864, __ (1983). The FCC based its Preemption Order on both the preemptive effect of § 220 of the Act and the agency's own regulatory power.[7] Although conceding that its depreciation methods

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(Footnote 6 continued)

> depreciation rules. Indeed we have expressly recognized that State commissions have a right to do so.

89 F.C.C.2d at __.

[7] The FCC rejected the argument that 47 U.S.C. § 152(b), *see supra* note 2, prohibits the FCC from preempting state depreciation practices. The FCC stated:

> Section 220(b) only prohibits the states from setting depreciation rates for telephone property inconsistent from those prescribed by the FCC. It does not require that any particular tariff for intrastate service be accepted by the state commissions. The setting od depreciation rates and classes of depreciable property only resolves a single issue impacting the ratemaking process. It does not restrict the state commission's broad discretion in setting charges for individual services.

92 F.C.C.2d at __.

would have an immediate upward impact on rates, the FCC reasoned that more timely capital recovery would encourage greater technological progress, which would, in turn, result in more efficient service and lower costs. According to the FCC, "[i]f competition is to be viable, it is necessary for prices to reflect depreciation expenses that are realistic for a competitive market." 92 F.C.C.2d at __. The FCC concluded: "[W]e find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void." 92 F.C.C.2d at __.

C. The Proceedings Below.

On May 3, 1982, the South Central Bell Telephone Company (South Central Bell) filed tariff revisions with the Louisiana Public Service Commission (Louisiana Commission) seeking an increase in intrastate rates in the amount of $238,600,000. As partial justification for the increased revenues, South Central Bell relied on the FCC's adoption of remaining life and SLELG depreciation methods in 1980 and the FCC's ruling in 1981 requiring the expensing of station connections. At the time of the filing, the Louisiana Commission required both the use of certain depreciation practices that recovered the cost of an asset at an initially slower rate and the capitalizing, instead of expensing, of station connections. On or about January 7, 1983, the FCC mailed copies of its January 6 Preemption Order to the Louisiana Commission, and on January 19, 1983, the order was published in the *Federal Register*.

The Louisiana Commission on May 19, 1983, denied South Central Bell's request for a rate increase. In its order, the Louisiana Commission expressed concern over Louisiana's declining economy and found the utility's

current rate of return, about 13.5%, was comparable to the rate found reasonable in 1981. Thus, because the rates were not increased nor was the rate of return reduced, the Louisiana Commission clearly implied its refusal to implement FCC-prescribed depreciation methods.[8]

In response to the Louisiana Commission's refusal to increase intrastate rates, South Central Bell filed suit in federal district court seeking a preliminary and permanent injunction requiring the Louisiana Commission to implement the depreciation methodologies and the expensing of station connections mandated by the FCC. After a hearing, the district court found that it had jurisdiction under 47 U.S.C. § 401(b) and that the prerequisites of that provision had been met. The district court, however, stated that, in light of the fact that intrastate ratemaking is still within the exclusive province of the states, the court would not order South Central Bell to implement specific tariffs. Instead, the court ordered South Central Bell to comply generally with the FCC Preemption Order and to set new rates within ten days. *South Central Bell Tel. Co. v. Louisiana Public Service Comm'n*, 570 F.Supp. 227, 232-34 (M.D.La. 1983).

On July 7, 1983, the Louisiana Commission, pursuant to the preliminary injunction, issued an order setting new rates. In this order, the Louisiana Commission found that application of the FCC-prescribed accounting methods

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[8] On the same day the Preemption Order was adopted, the FCC issued a ruling in Docket No. 82-576 that prescribed specific SLELG rates to be used in calculating depreciation for South Central Bell equipment. This order, released a few days before the Preemption Order, also declared FCC-prescribed depreciation methods binding on the states. If the Louisiana Commission had used these specific rates, the revenue requirements of South Central Bell would certainly have increased.

resulted in an increased expense level of $40,506,000. The Louisiana Commission, however, after reducing the rate of return from 13.5% to 12%, also found that an increase in revenue of only $12,700,000 was needed to meet those increased costs. The Louisiana Commission justified the reduction in the rate of return on the grounds that the prime rate had declined since 1981 and that 7.5% of South Central Bells' total capital was cost-free investment tax credits.[9] No evidence was received in connection with the July 7, 1983 order.

Soon thereafter, South Central Bell filed a motion in district court seeking to modify the preliminary injunction

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[9] In its order, the Louisiana Commission stated:

> As noted, the Commission denied the rate request of South Central Bell in May, but did not make a determination of the fair rate of return on equity. The currently authorized overall rate of return of South Central Bell was set in 1981, when market interest rates were significantly higher than they are today. The prime rate has remained at about 10½ per cent for some time. In addition, the rate of return earned by the Company includes a return on unamortized investment tax credits, which constitute approximately 7.5 per cent of South Central Bell's total capital. In fact, however, these tax credits are cost-free investment of the Company, so in reality the rate of return on its investor-supplied equity is higher than that authorized for regulatory purposes. When these factors are viewed in light of the continued low level of inflation, and continued high unemployment, we find that a rate of return of equity of 12 per cent is sufficient to assure confidence in the Company's financial soundness, will be adequate to maintain and support its credit and will permit it to raise the capital necessary to perform its public functions. The gross revenue increase necessary to produce a rate of return on equity of 12 per cent after taking account of the ratemaking adjustments proposed by a consultant of the Commission, Bruce M. Louiselle, and recognizing the full amount of the FCC-mandated accounting changes as quantified by South Central Bell, is $12,700,000.
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> Record at 203.

or, alternatively, to hold the Louisiana Commission in contempt. The district court, stressing the fact that the Louisiana Commission had not received any additional evidence, found that "the Commission had absolutely no justification for failing to order an increase in revenues sufficient to cover the increased operating costs of the company." 570 F.Supp. at 237. The district court stated:

> The Public Service Commission, here has not complied with the order of this court. The Public Service Commission itself has determined that there is an increase in operating expenses of $40,506,000.00 and, unless there are reasonable and proper adjustments to be made, that increase in operating costs mandates an equivalent increase in revenues. Adjusting fair return on equity downward, in the absence of evidence justifying such an adjustment, was arbitrary and capricious—a simple exercise in arithmetic designed to minimize the increase in telephone rates.

Id. at 237-38. The court concluded that, based on the foregoing, it had no alternative but to accept the Louisiana Commission's finding that South Central Bell had increased expenses of $40,506,000 and to require the Louisiana Commission to increase rates sufficiently to cover that amount. The Louisiana Commission appeals.

II. DISCUSSION.

The Louisiana Commission challenges on appeal the modified preliminary injunction on grounds that (1) the statutory requirements of 47 U.S.C. § 401(b) have not been met, (2) the district court failed to comply with traditional principles of equity in issuing the injunction, (3) the

injunction sets intrastate rates in violation of the Communications Act, and (4) under well-established principles of comity the district court should have abstained from exercising jurisdiction over the case. We note at the outset that the Louisiana Commission does not challenge, and nor can we consider, the validity of the underlying FCC Preemption Order. As the district court correctly held, the exclusive mechanism for obtaining judicial review of FCC action is a direct appeal to the court of appeals pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).[10] *See FCC v. ITT World Communications, Inc.*, __ U.S. __, 104 S.Ct. 1936, 1939-40, 80 L.Ed.2d 480 (1984); *Southwestern Bell Tel. Co. v. Arkansas Public Serv. Comm'n*, 738 F.2d 901, 905 (8th Cir.1984). Thus, because this case concerns the validity of a preliminary injunction issued by the district court pursuant to § 401(b), we assume for purposes of this appeal that the underlying Preemption Order is a legal and proper act of the FCC.[11]

A. Section 401(b).

Section 401(b) provides as follows:

> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the

[10] Section 2342 provides that "[t]he court of appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of ... all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." Section 402(a) provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter ... shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28."

[11] We point out nonetheless that the Fourth Circuit in a § 402(a) proceeding has recently upheld the validity of the Preemption Order. *Virginia State Corp. Comm'n v. FCC*, 737 F.2d 388 (4th Cir.1984). The Louisiana Commission was an intervenor in those proceedings.

> Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Under § 401(b), a party seeking enforcement of an FCC declaration may obtain an injunction upon a finding that (1) the declaration is an FCC "order" within the meaning of the Act, (2) the order was regularly made and duly served upon the defendant, (3) the defendant is in disobedience of the order, and (4) the party seeking the injunction has been injured by the defendant's disobedience. In the proceeding below, the district court found that all four of these prerequisites had been met. On appeal, the Louisiana Commission disputes the district court's findings that the January 6 Preemption Order (1) was an "order" and (2) had been "duly served," both within the meaning of the Act.[12]

1. The Meaning of "Order."

The Louisiana Commission presents what can be taken to be two distinct arguments for is position that the meaning of the word "order" in the statute does not encompass the FCC January 6 Preemption Order. First, the

[12] The Louisiana Commission also argues that it is not in disobedience of the Preemption Order or the original injunction. We address this argument in subpart C.

Louisiana Commission contends that the Preemption Order was issued merely to clarify the law and not to compel state regulatory commissions to take any action. Specifically, the Louisiana Commission asserts that the order merely is an interpretation of the preemptive effect of § 220(b), which provides that the FCC "shall, as soon as practicable," make depreciation prescriptions. According to the Louisiana Commission, the Preemption Order is not binding and thus is unenforceable under § 401(b).

In determining the effect of an administrative action, we must, of course, look beyond its label to its substance. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908-09 (5th Cir.1983); *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir.1979). If an administrative agency intends a declaration to be no more than an expression of its construction of a statute or rule, the declaration is "interpretive" in nature and does not have the full force of law. If, on the other hand, an agency acts in accordance with its legislatively delegated rulemaking authority, the declaration is "legislative" in nature and binding on all appliable persons. *Chamber of Commerce of the United States v. OSHA*, 636 F.2d 464, 468 (D.C.Cir. 1980); *Brown Express, Inc., supra*, at 700; *Joseph v. United States Civil Service Comm'n*, 554 F.2d 1140, 1154 n. 26 (D.C.Cir.1977). In addition, administrative agencies may make rules of general application in individual adjudicative proceedings. *See Shell Oil v. FERC*, 707 F.2d 230, 235 (5th Cir.1983).

The district court held that the language of the Preemption Order "is plainly directed to all state regulatory bodies and plainly declares that their depreciation procedures must comply with FCC procedures." 570 F.Supp. at 236. We agree. The FCC adopted the Preemption Order in a rulemaking proceeding only after receiving a significant number

of comments and reply comments.[13] Although the FCC stated in the course of the Preemption Order that § 220(b) of the Communications Act automatically preempted state depreciation policies, the FCC also explicitly relied on its own legislatively delegated power to preempt. 92 F.C.C.2d at __. Indeed, the FCC in the Preemption Order did far more than merely interpret the Act and relevant legislative history. The FCC analyzed the policies underlying its depreciation methodologies and concluded in no uncertain terms that "this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates."[14] Reading the Preemption Order as a whole, we have no

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[13] The FCC received comments from the Arkansas Public Service Commission, the Public Utilities Commission of Ohio, the Public Utilities Commission of the State of California, the Virginia State Corporation Commission, NARUC, the United States Independent Telephone Association, the Ohio Office of Consumers' Counsel, the United Telephone System, Inc., and the Idaho Public Utilities Commission, Inc.

[14] The FCC also stated:

> In the past the communications marketplace was typified by monopoly conditions and life and salvage factors underlying the state rates were generally very similar, if not identical, to those used by the Commission. In that environment it was not essential that the Commission assert all the authority granted it. See *Computer and Communications Industry Association v. FCC*, [693 F.2d 198 (D.C.Cir.1982)]. As discussed, *infra*, in the more competitive conditions prevailing today, the utilization of proper methods and rates is more critical if the proper incentives are to be created to insure that the marketplace will function efficiently to bring the benefits of that competition to the ratepayers of this country. Therefore, where it is necessary to protect important federal policies against frustration by inconsistent state actions, we will exercise the full breadth of our depreciation powers.

92 F.C.C.2d at __.

doubt that in issuing the order the FCC intended not merely to advise the public on its interpretation of the preemptive effect of § 220(b), but to preempt as a matter of substantive law inconsistent state practices.[15]

Second, the Louisiana Commission contends in effect that the FCC Preemption Order, regardless of its binding effect, is not enforceable under § 401(b) because that provision only applies to those orders that are the product of an adjudicative proceeding. By making this argument, the Louisiana Commission is in effect inviting us to travel down the same path recently traversed by the First Circuit in *New England Tel. & Tel. Co., supra.* After carefully reviewing the arguments both in favor and against adopting such a narrow interpretation of § 401(b), however, we find that we must decline this invitation and instead join the Eighth Circuit in upholding the authority of the district court under § 401(b) to enforce the FCC Preemption Order. *See Southwestern Bell Tel. Co., supra.*

The First Circuit in *New England Tel. & Tel. Co., supra,* based its interpretation of "order" in § 401(b) on several policy considerations.[16] The court expressed

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[15] In so holding, we join the First, Fourth and Eighth Circuits which have also regarded the Preemption Order as a rule of substantive law. *See New England Tel. & Tel. Co. v. Public Utilities Comm'n,* 742 F.2d 1, 4 (1st Cir.1984); *Virginia State Corp. Comm'n, supra,* at 393-94; *Southwestern Bell Tel. Co., supra,* at 904.

[16] The First Circuit also relied on the definition of the word "order" in the Administrative Procedure Act (APA), 5 U.S.C. § 551(6), as at least furnishing a starting point from which to begin the inquiry. As the First Circuit acknowledged, however, the Communications Act was enacted more than ten years before the APA, and the APA itself only makes its terminology mandatory in APA contexts. *See* 5 U.S.C. § 551. In non-APA contexts administrative terminology is still used inconsistently among administrative agencies. *See* B. Schwartz, Administrative Law § 4.1 (2d ed. 1984) (the Treasury continues to call its

concern, first, that, if § 401(b) were construed to allow enforcement of general FCC rules and regulations by private parties, the FCC's primary control over the enforcement of the Communications Act would be seriously undermined. Such a construction, second, would place the interpretation of the rules and regulations in the hands of the some 700 federal district judges, thus threatening the sound development of a coherent nationwide policy. Third, a broad construction of § 401(b) would often result in fractionated review of intrastate rates by encouraging private parties to challenge in federal court discrete aspects of the state ratemaking procedure. Fourth, the court noted that allowing private parties to utilize § 401(b) solely to enforce specific adjudicatory orders would make more intelligible the inability of district courts in § 401(b) proceedings to consider the substantive validity of the underlying order.

While we acknowledge the importance of these policy considerations, we are not persuaded by them to adopt a restrictive construction of the statute. First, the First Circuit was not able to cite, and our own research fails to uncover, a single precedent in support of its interpretation.[17] At least two Supreme Court decisions, however, can be read as providing support for interpreting the term "order" in § 401(b) to include administrative rules. In *Ambassador, Inc. v. United States,* 325 U.S. 317, 65 S.Ct. 1151, 89 L.Ed.

(Footnote 16 continued)
general rules "decisions" and the FCC continues to call its regulations "orders").

[17] Although the First Circuit cites *Kroeger v. Stahl,* 148 F.Supp. 403, 406 (D.N.J.), *aff'd,* 248 F.2d 121 (3d Cir.1957), in support of the contention that "order" in § 401(b) should be given the same meaning that it has under the APA, we note that *Kroeger* involved not a rule but a "special temporary authorization" that was held not to be a "final disposition."

1637 (1945), the Supreme Court considered the validity of a preliminary injunction issued against hotels in violation of a tariff regulation imposed by the telephone company. The tariff regulation had been filed in compliance with an FCC rulemaking order and had not been specifically upheld by the FCC as reasonable. The Supreme Court, in sustaining the injunction, upheld the district court's determination that the defendant hotels were in violation of the regulation and found that the suit to enjoin the violation was authorized under "§ 401." Although the Court failed to specify the subsection of § 401 to which it was referring, it is clear that the suit had to have been brought under § 401(b) since § 401(a) only authorizes a district court to enjoin violations of the Act itself.[18] If § 401(b) is available to enforce tariff regulations filed pursuant to agency rulemaking, the section should surely be available also to enforce rules and regulations of the agency itself.

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[18] Section 401(a) provides as follows:

> (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

In denying a petition for rehearing, the First Circuit in *New England Tel. & Tel. Co.* distinguishes *Ambassador, Inc.* on the ground that the action in that case might have been brought pursuant to § 401(a). The First Circuit relies on the statement made by the Supreme Court that "a departure from the [tariff] regulation is forbidden by the Act." 325 U.S. at 325, 65 S.Ct. at 1155. Violating rules and regulations of the FCC though is just as violative of the Act as is disobeying tariff regulations. *See* 47 U.S.C. § 416(c). Under the First Circuit's reasoning, therefore, any regulatory violation would authorize a § 401(a) injunction. We think it is clear, however, in light of the existence of § 401(b), that the scope of a district court's authority under § 401(a) is limited to enjoining violations of specific provisions of the Act and not rulemaking orders or tariff regulations.

Furthermore, in *Columbia Broadcasting System, Inc. v. United States (CBS)*, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942), the Supreme Court held that FCC regulations were "orders" within the meaning of § 402(a).[19] In asking us to construe "order" more narrowly in the context of § 401(b) than did the Supreme Court in interpreting the neighboring § 402(a), the Louisiana Commission faces the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 609, 76 L.Ed. 1204 (1932). *See also Hotel Equities Corp. v. CIR*, 546 F.2d 725, 728 (7th Cir. 1976); *Curry v. Block*, 541 F.Supp. 506, 518 (S.D.Ga.1982), *aff'd*, 738 F.2d 1556 (11th Cir.1984). This presumption, of course, "is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." 286 U.S. at 433, 52 S.Ct. at 609.

CBS dealt with FCC regulations that precluded a broadcast station from obtaining a license if the station had enterd into certain types of contracts with a broadcast network. CBS brought the action under § 402(a) in order to secure judicial review of the regulation. In finding that the regulation was an order within the meaning of § 402(a), the Supreme Court pointed out that, inasmuch as the regulations governed and had an immediate impact upon the contractual relations between the stations and the networks, the implementation of the regulation was not dependent on administrative action. The Court held that, therefore, in order to avoid the harm that would otherwise result from

[19] *See supra* note 10.

the execution of an illegal regulation, judicial review under § 402(a) was appropriate. According to the Court, "[w]hen, as here, such regulations are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a)." *Id.* 316 U.S. at 418-19, 62 S.Ct. at 1201.

The First Circuit, in considering *CBS*, found that the Court's reasoning did not apply to a § 401(b) proceeding because the same considerations of fairness supporting a broad interpretation of "order" were not present in that context. We disagree. Substantial unfairness can result from either compliance with an improper regulation or noncompliance with a proper one. Especially in the context of a pervasively regulated industry, beneficiaries of a self-executing regulation should not be denied the intended effect of the regulation without recourse merely because the FCC has yet to institute enforcement proceedings. In the instant case, the FCC Preemption Order was issued in response to a perceived failure of the regulatory system to furnish the telephone industry with sufficient cash flow. If each telephone company must wait to receive this benefit until the FCC is able to institute individual enforcement proceedings, telephone companies may well suffer for a significant period of time the harm the Preemption Order was designed to prevent.

Second, we adopt a broad construction of § 401(b) because we are not convinced that the policies put forward by the First Circuit are threatened seriously enough to outweigh the vital policies furthered by private enforcement of FCC rulemaking orders. The FCC has broad discretion to act through either case-by-case adjudication or the rulemaking process. *SEC v. Chenery Corp.*, 332 U.S. 194,

202, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947); *Avoyelles Sportsmen's League, Inc., supra,* at 909. Thus, if the FCC deems that enforcement of a certain policy is desirable on an individual basis, it certainly has the discretion to proceed other than by adopting a self-executing rule. To a large extent, therefore, the FCC itself can avoid private incursions upon its enforcement responsibilities. Moreover, through the use of agency intervention and amicus curiae briefs, as well as through the application of the doctarine of primary jurisdiction, the courts and the FCC should be able to prevent both significant inconsistent applications of FCC rules and serious judicial encroachment upon FCC responsibilities. *See, e.g., American Trucking Ass'n v. ICC,* 682 F.2d 487, 491 (5th Cir.1982) (primary jurisdiction allows court faced with an issue requiring the special expertise of an agency to suspend proceedings pending referral of the issue to the agency for official position).

Most importantly, however, we simply do not see how the FCC's responsibility in developing and enforcing a coherent communications policy would be significantly undermined by giving the FCC discretion to adopt self-executing rules and then to rely in part on private enforcement. We firmly believe, in fact, that under appropriate circumstances such an approach would promote significant federal interests in conserving limited agency resources and in accelerating the implementation of FCC rules and regulations. We can also envision situations in which only a private party would have a sufficient interest in the obedience of an FCC rule to institute an enforcement proceeding. *Cf. FCC v. Sanders Brothers Radio Station,* 309 U.S. 470, 477, 60 S.Ct. 693, 698, 84 L.Ed. 869 (1940) (person with a financial stake in the granting of a license may be the only one with sufficient interest to seek judicial review).

In short, we find that both precedent and sound policy support a broad interpretation of § 401(b) to allow private enforcement of FCC rules and regulations.[20] Therefore, we hold that the FCC Preemption Order is an order within the meaning of § 401(b).[21]

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[20] Further support comes from cases involving § 16(12) of the Interstate Commerce Act, 49 U.S.C. § 16(12) (repealed). The legislative history of § 401(b) indicates that Congress took the text of § 401(b) almost word for word from § 16(12). *See* S.Rep. No. 781, 73d Cong., 2d Sess. 9 (1934). Although some courts have held that under § 16(12) only orders that specifically command certain individuals to take particular actions may be enforced, *see, e.g., Farmers' Loan & Trust Co. v. Northern Pac. Ry.*, 83 F. 249 (D.Wash.1897), other courts, including the Fifth Circuit, have enforced rules and regulations under the statutory provision. *See Pacific Fruit Express Co. v. Akron, Canton, & Youngstown R.R.*, 524 F.2d 1025, 1031 (9th Cir.1975), *cert. denied*, 424 U.S. 911, 96 S.Ct. 1107, 47 L.Ed.2d 315 (1976); *United States v. City of Jackson*, 318 F.2d 1, 9 (5th Cir.1963).

[21] The Louisiana Commission also argues in its reply brief that South Central Bell is not a "party injured" by the Louisiana Commission's noncompliance with the Preemption Order. We find this argument to be without merit. The FCC reconsidered the preemptive effect of its depreciation policies in response to a petition filed by AT&T on behalf of itself and the associated Bell System Operating Companies, including South Central Bell. 92 F.C.C.2d at __. *But see South Central Bell Tel. Co. v. Louisiana Public Serv. Comm'n*, 412 So.2d 1069, 1075 n. 8 (La.1982). (South Central Bell held not to be a party in *Computer II* decision for purpose of La.Rev.Stat.Ann. § 45:1180). Moreover, the same policy considerations that persuaded us to adopt a broad reading of "order" equally persuades us to adopt a broad reading of "parties." Finally, we note that courts that have allowed private parties to enforce rules and regulations of the Interstate Commerce Commission under § 401(b)'s sister provision, 49 U.S.C. § 16(12), have regarded as a party any person injured who was a member of the benefited class. *See Carothers v. Western Trans. Co.*, 554 F.2d 799, 805 (7th Cir.1977); *Pacific Fruit Express Co. v. Akron, Canton, & Youngstown R.R.*, 355 F.Supp. 700, 709 (N.D.Cal.1973), *aff'd*, 524 F.2d 1025 (9th Cir.1975), *cert. denied*, 424 U.S. 911, 96 S.Ct. 1107, 47 L.Ed.2d 315 (1976). *Cf. Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 72, 91 S.Ct. 203, 210, 27 L.Ed.2d 203 (1970).

2. The Meaning of "Duly Served."

Section 401(b) authorizes a district court to issue a writ of injunction only upon a finding that the underlying FCC order was "duly served." It is undisputed that service was accomplished below both by mail and by publication in the *Federal Register.* Moreover, the Louisiana Commission concedes that it had actual notice of the FCC Preemption Order. The Louisiana Commission, nevertheless, asserts on appeal that the order was not "duly served" within the meaning of the Act because the Louisiana Commission was not personally served with the order. Relying on *Milliken v. Meyer,* 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940), the Louisiana Commission argues that, in light of the hundreds of mailings the Louisiana Commission receives annually from regulatory agencies, service by mail cannot be considered service reasonably calculated to give actual notice. In addition, the Louisiana Commission contends that it is entitled to personal service because that is the manner of service provided to common carriers under various FCC regulations.

We think the Louisiana Commission misconceives the purpose of the "duly served" prerequisite of § 401(b). There is no indication that the requirement of due service was designed to give a person in violation of an FCC order promulgated according to proper procedure a right to additional notice of that order before enforcement proceedings can commence. Rather, we believe the term "duly served" quite plainly refers only to procedural regularity. *See Southwestern Bell Tel. Co., supra,* at 907. Under this construction, § 401(b), by directing the district court to determine whether "the order was regularly made and duly served," authorizes and requires the district court, although lacking authority to review the substance of an FCC order,

to find before issuing an injunction that the order is enforceable as a matter of procedural law. Thus, the requirement of "due service" is met if the defendant in a § 401(b) proceeding received notice legally sufficient to make the order enforceable.

Under the APA, a rule is enforceable once it is published in the *Federal Register*. 5 U.S.C. § 552(a)(1). The Supreme Court has held that appearance of a rule in that publication constitutes legal notice to the general public. *See, e.g., Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85, 68 S.Ct. 1, 3-4, 92 L.Ed. 10 (1947). Although we recognize that some agencies may be required to give additional notice to interested parties as a result of the agencies' own rules and regulations, *see Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C.Cir.1976), FCC regulations clearly require only notice by publication for rulemaking documents. *See* 47 C.F.R. § 0.445(c).[22] Thus, because the FCC Preemption Order at issue in this case was in fact published in the *Federal Register*, we hold that the order was duly served within the meaning of the Act and enforceable against the Louisiana Commission.

B. Irreparable Injury.

Under traditional principles of equity, a court can usually issue a preliminary injunction only upon a finding of irreparable injury. *See, e.g., Canal Authority v. Callaway*, 489 F.2d 567, 572-73 (5th Cir.1974). The

[22] We not further that uner 47 C.F.R. § 0.445(a), FCC opinions and "orders" require only service by mail. Thus, even if "order" were given the same meaning in FCC regulations that the word has in the context of § 401(b), the Preemption Order would have been "duly served." Although one provision of the Act, § 416(a), requires personal service of FCC orders, that provision by its own terms applies only to carriers.

Louisiana Commission argues that the equitable requirement of irreparable injury also applies to § 401(b) proceedings and that the district court erred in not requiring South Central Bell to make such a showing. It is well-established, however, that, when, as is the case here, an injunction is expressly authorized by statute and the statutory conditions are satisfied, the usual prerequisite of irreparable injury need not be established. *See, e.g., Gresham v. Windrush Partners,* 730 F.2d 1417, 1423 (11th Cir.1984); *Trailer Train Co. v. State Board of Equalization,* 697 F.2d 860, 869 (9th Cir.1983), *cert. denied,* __ U.S. __, 104 S.Ct. 149, 78 L.Ed.2d 139 (1983); *Atchison, Topekka and Santa Fe Ry. v. Lennen,* 640 F.2d 255, 259 (10th Cir.1981); *Murry v. American Standard, Inc.,* 488 F.2d 529, 531 & n. 2 (5th Cir.1973); *United States v. Hayes International Corp.,* 415 F.2d 1038, 1045 (5th Cir. 1969); *cf. Hecht v. Bowles,* 321 U.S. 321, 331, 64 S.Ct. 587, 592, 88 L.Ed. 754 (1944) (court's discretion under statute expressly authorizing injunction "must be exercised in light of the large objectives of the Act"). The Seventh and Eighth Circuits have already applied this general rule to private parties seeking to enforce under § 401(b) FCC rulemaking orders. *See Illinois Bell Tel. Co. v. Illinois Comm'n,* 740 F.2d 566, 571 (7th Cir.1984); *Southwestern Bell Tel. Co. v. Arkansas Public Service Comm'n, supra,* at 908 n. 15. Accordingly, we hold that the district court did not err in issuing the preliminary injunction absent a finding of irreparable injury.[23]

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[23] Cases cited by the Louisiana Commission in support of the need to find irreparable injury are distinguishable in that they involve implied causes of action. *See, e.g., Rondeau v. Mosinee Paper Corp.,* 422 U.S. 49, 63-64, 95 S.Ct. 2069, 2078-79, 45 L.Ed.2d 12 (1975) (plaintiff in asserting cause of action not authorized expressly by statute or its legislative history is not relieved of the burden of the traditional prerequisites of relief).

C. The Modified Injunction.

As discussed above, the district court issued its modified preliminary injunction upon a finding that the Louisiana Commission had violated the court's original injunction ordering the Louisiana Commission to reset intrastate rates using FCC-prescribed depreciation and methodologies and rates. The court found that the Louisiana Commission, in reducing South Central Bell's fair rate of return from 13.5% to 12%, had acted arbitrarily and capriciously and with the sole purpose of covering South Central Bell's increased expenses without having to order a corresponding increase in rates. The district court therefore ordered the Louisiana Commission to increase rates sufficiently to allow South Central Bell to recover its additional operating expenses in full. On appeal, the Louisiana Commission argues that it complied with the original injunction and that it reasonably adjusted the fair rate of return downward to take into account the lower investment risks that would result from compliance with the FCC Preemption Order. In addition, the Louisiana Commission asserts that the dollar-specific terms of the modified injunction constitute an unwarranted intrusion into the Louisiana Commission's responsibility to regulate intrastate rates and is prohibited by § 152 of the Communications Act.

1. The Finding of Non-compliance.

In holding that the Louisiana Commission had violated the injunction, and thus the Preemption Order, by reducing the rate of return merely to minimize telephone rates, the district court necessarily had to make two determinations: (1) that neither the injunction nor the Preemption Order

allowed the Louisiana Commission to avoid setting increased rates by simply lowering the rate of return and (2) that the Louisiana Commission did in fact reduce the rate of return other than for a valid reason. We are therefore called upon here not only to review a finding of fact, but also to interpret an FCC order whose substantive validity is beyond our judicial scrutiny.

The district court determined below that under the Preemption Order, "unless there are reasonable and proper adjustments to be made, [the] increase in operating costs mandates an equivalent increase in revenues." 570 F.Supp. at 237. The district court thus held that the Preemption Order, although explicitly only preempting the use of inconsistent state depreciation practices, also barred the states from avoiding the consequences of the Preemption Order by manipulating other independent variables used in computing intrastate rates, such as the rate of return.[24] Although we recognize that under this construction the Preemption Order comes perilously close to undermining completely state authority and discretion to set intrastate rates,[25] we find that, in light of the order's regulatory

[24] By "independent" we do not mean to say that the depreciation practices used by a utility have absolutely no effect on the fair rate of return. As the depreciation rate is accelerated, capital recovery is quicker and, as a consequence, the risks to investors may well be reduced. The rate of return, however, is independent in the sense that a regulatory agency in setting the rate of return must take into account factors other than its effect on the costs of services. *See* J. Bonbright, *supra* note 1, at 148-58.

[25] In his dissenting opinion in *Virginia State Corp. Comm'n v. FCC*, *supra*, at 398, Judge Widener predicted: "The logical result of [upholding the Preemption Order] is to permit the FCC to abrogate completely the state regulation of intrastate ratemaking for the carriers' intrastate operations in violation of the Communications Act."

purpose, we must accept the district court's interpretation.

In the Preemption Order, the FCC stated that preemption is necessary in order to furnish the telephone industry with more timely capital recovery. According to the FCC, greater capital recovery is needed under the competitive conditions that exist today in order to encourage the modernization of facilities and the investment of capital. The FCC stated;

> Approximately 75 percent of exchange plant is allocated to the intrastate jurisdiction. It is clear that unless telephone plant, including that portion subject to allocation to the intrastate jurisdiction, is depreciated at a reasonable rate, improperly timed capital recovery will occur. Indeed, in an increasingly competitive environment, it is possible that improper capital recovery could delay or prevent modernization which would add to the costs borne by ratepayers and could, ultimately, threaten carriers' ability to fully recover their invested capital. Moreover, the extent of state action attempting to prevent carriers from utilizing our depreciation prescriptions places substantial burdens on carriers and could well impair their ability to raise the investment capital they will need to fully compete in the continually evolving competitive telecommunications marketplace. Such a result could undermine the achievement of the Commission's objective to develop policies that will engender a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices.

92 F.C.C.2d at __. This purpose would plainly be severely frustrated if state regulatory commissions could offset increased expenses by reducing the rate of return without

any regard for the companies' needs to compensate investors and to attract new capital.[26] Thus, because we think it is clear that the Preemption Order in prohibiting inconsistent state depreciation practices was intended also to preclude state responses designed to evade the consequences and the purposes of that preemption, we uphold the district court's first determination.

In disputing the district court's second determination, that the rate of return was reduced merely to avoid high telephone rates, the Louisiana Commission challenges a finding of fact. Thus, we apply the "clearly erroneous" standard of review as articulated in Federal Rule of Procedure 52(a). *See Gearhart Industries, Inc. v. Smith International, Inc.*, 741 F.2d 707, 710 (5th Cir.1984); *Apple Barrel Productions, Inc. v. Board*, 730 F.2d 384, 386 (5th Cir.1984). The district court's conclusion that the Louisiana Commission had lowered the rate of return without justification relied largely on the Louisiana Commission's May 19, 1983 order denying a rate increase. As partial justification for that denail, the Louisiana Commission stated: "Since the Company has earned a rate of return comparable to that found to be reasonable by the Commission in [1981], we find no justification for an increase in rates at this time." According to the district court, this statement constituted "very clearly a reiteration in 1983 that the rate of return established in 1981 is

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[26] These criteria are the ones usually considered in computing the rate of return. *See, e.g., Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 603, 64 S.Ct. 281, 288, 88 L.Ed. 333 (1944) ("[The rate of return] should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.").

still in effect." 570 F.Supp. at 237. The district court further found no indication that, between the denial on May 19 and the July 7 order reducing the rate of return, conditions or information available to the Louisiana Commission had changed sufficiently to warrant the downward adjustment. In fact, the district court found that the Louisiana Commission had received no additional evidence during that time. Although on appeal the Louisiana Commission contends that the application of FCC-prescribed depreciation practices is itself sufficient justification for the reduction in the rate of return because of associated lower investor risk, we note that this explanation was never presented to the district court and that it was presented to us for the first time in the Louisiana Commission's reply brief. Based on these considerations, we hold that the district court's finding was not clearly erroneous[27] and that the Louisiana Commission was in fact in violation of the injunction.

2. The Power of the District Court.

The Louisiana Commission asserts two possible grounds for its contentin that the modified injunction was beyond the power of the district court because it was dollar-specific. First, the Louisiana Commission contends that, by requiring a specific increase in rates, the district court violated § 152(b) of the Communications Act which prohibits both the FCC and the district court from setting

[27] While the court apparently did not hold an evidentiary hearing before modifying its injunction, the parties were afforded and took advantage of the opportunity to brief and argue fully their positions to the district court. Moreover, both parties were permitted wide latitude in filing attachments to their briefs and memoranda. *See Commerce Park at DFW Freeport v. Mardian Const. Co.*, 729 F.2d 334, 340 (5th Cir. 1984).

intrastate rates. The district court justified its dollar-specific injunction on the ground that it relied entirely on the Louisiana Commission's own calculations of the impact the FCC-prescribed depreciation practices would have on South Central Bell's expense level. Thus, reasoned the district court, it did not "set rates."

We reject this contention of the Louisiana Commission, but not for the reasons stated by the district court. Section 152(b) states that "nothing in this chapter shall be construed to give [the FCC] jurisdiction with respect to ... charges ... for or in connection with intrastate communication." Section 401(b) generally gives the district court authority to enjoin violations of FCC orders. Neither section imposes restrictions on the court's authority to enforce an FCC order; rather, it is clear that under the Act the extent of the court's power to enjoin is commensurate with the reach of the underlying order. That being the case, we cannot determine whether the district court exceeded its authority under the Act in issuing the dollar-specific injunction without also establishing whether the Preemption Order being enforced was an *ulta vires* act of the FCC. Therefore, because we must assume the substantive validity of a FCC order in an appeal from a § 401(b) enforcement proceeding, we must also refrain, as long as the injunction was necessary to the enforcement of the FCC order, from inquiring whether the district court's enforcement action was per se beyond its authority under the Act.

The second ground asserted by the Louisiana Commission in support of its attack on the specific terms of the injunction is that, by ordering an increase in rates in the amount of $40,506,000, the district court exceeded

mandates of the Preemption Order. This argument is without merit. We have already concluded that the Louisiana Commission violated the Preemption Order by manipulating the rate of return for the sole purpose of avoiding high telephone rates. Thus, we have no trouble finding tht the injunction requiring a raise in the rates equal to the increase in expenses is sufficiently tailored to the dictates of the Preemption Order. We note, however, that the Preemption Order only prohibits those changes in the rate of return made merely to avoid the effect of FCC-prescribed depreciation practices. The modified injunction, therefore, will not in the future bar the Louisiana Commission from adjusting the rate of return as long as the determination to do so is made in good faith.

D. Comity.

The Louisiana Commission finally contends that, even if the district court acted within its statutory and equitable authority in issuing the modified preliminary injunction, the principle of comity requires abstention because the matters before the district court were predominantly local in nature.[28] The Louisiana Commission relies on *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951), in which the Supreme

[28] We reject out of hand the Louisiana Commission's claim that the Johnson Act, 28 U.S.C. § 1342, prohibits the district court from issuing the injunction. The Johnson Act is applicable only when "[j]urisdiction is based solely on diversity of citizenship or repugnance of the [state action] to the Federal Constitution." § 1342(1); *see also DeKalb County v. Southern Bell Tel. & Tel. Co.*, 358 F.Supp. 498, 504 (N.D.Ga.1972) (all four preconditions must be present before Johnson Act is applicable), *aff'd*, 478 F.2d 700 (5th Cir.1973). As the district court noted, South Central Bell here asserts jurisdiction under § 401(b) of the Communications Act, not upon any alleged repugnance of the defendant's action to the Constitution. 570 F.Supp. at 234. *See also Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n*, 560 F.Supp. 844, 847 (D.Md.1983).

71 S.Ct. 762, 95 L.Ed. 1002 (1951), in which the Supreme Court held that a district court should abstain from intervening in state regulatory matters that are largely of local concern and fall within the special expertise of state administrative agencies or reviewing courts. *See also Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); *Gulf Water Benefaction Co. v. Public Utility Comm'n*, 674 F.2d 462 (5th Cir.1982).

We find that this cse is not an appropriate one for abstention. Unlike *Alabama Public Service Comm'n* and *Burford*, this case concerns issues in no way dependent on local factors or local expertise for their resolution. Rather, the claim presented here is predicated upon a naked exercise of the federal preemption power. Under these circumstances, it is well-established that "thee basic premise of preemption—avoiding needless federal court intervention into important matters within the state's jurisdiction to regulate—obviously is lacking." *Aluminum Co. of America v. Utilities Comm'n*, 713 F.2d 1024, 1030 (4th Cir.1983), *cert. denied*, __ U.S. __, 104 S.Ct. 1326, 79 L.Ed.2d 722 (1984). *See also Baggett v. Department of Professional Regulation*, 717 F.2d 521, 524 (11th Cir. 1983) ("When, because of preemption a particular state proceeding is beyond its regulatory authority, the need for protection of the state's comprehensive regulatory scheme ... lends no support for abstention ...."); *International Brotherhood of Electrical Workers v. Public Service Comm'n*, 614 F.2d 206, 212 n. 1 (9th Cir.1980) ("If a preemption claim is well-founded ... *Burford* abstention cannot be appropriate.). Accordingly, we hold that the district court properly exercised jurisdiction in the instant case.

III. CONCLUSION.

For the foregoing reasons, we hold that the district court properly issued the preliminary injunction.

AFFIRMED.

SOUTH CENTRAL BELL TELEPHONE COMPANY

v.

LOUISIANA PUBLIC SERVICE COMMISSION,
Thomas E. Powell, George J. Ackel, Ed Kennon,
Louis Lambert and John F. Schwegmann.

Civ. A. No. 83-557-A.

United States District Court,
M.D. Louisiana

June 27, 1983.

On Motion For New Trial Aug. 1, 1983.

Herschel Abbott, Jr., New Orleans, La., for Plaintiff.

Michael P. Fontham, New Orleans, La., Marshal B. Brinkley, Louisiana Public Service Comm., Baton Rouge, La., Shelly Zwick, Asst. U.S. Atty., Baton Rouge, La., for defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JOHN V. PARKER, Chief Judge.

Plaintiff, South Central Bell Company, brings an action for declaratory and injunctive relief against the defendants, the Louisiana Public Service Commission and its individual commissioners, Thomas E. Powell, George J. Ackel, Ed Kennon, Louis Lambert and John G. Schwegmann, Jr. This matter is before the court on plaintiff's motion for a preliminary injunction. A hearing was held and the motion was submitted upon the submission of briefs. The court has subject jurisdiction under 28 U.S.C. § 1337.

FINDINGS OF FACT

1) Defendant, Louisiana Public Service Commission, is authorized by the laws of the state of Louisiana to regulate the intrastate rates, services, facilities and practices of South Central Bell Company insofar as that company is engaged in the business of supplying utility service to the public with the state of Louisiana.

2) On May 3, 1982, South Central Bell filed tariff revisions with the Louisiana Public Service Commission seeking an increase of $238,600,000.00 in annual revenues in Docket No. U-15445.

3) As part of the justification for the increase, plaintiff relied upon the Federal Communications Commission's (FCC) 1980 adoption of the Remaining Life and Straight Line Equal Life Group depreciation method in the Order released December 5, 1980, in Docket 20188, 83 F.C.C.2d 267 (1980), on reconsideration 87 F.C.C.2d 916 (1981). Plaintiff further relied upon the F.C.C. Order which requires the expensing of station connection released March 30, 1981, CC Docket No. 79-105, 85 F.C.C.2d 818 (1981).

4) On December 30, 1982, the F.C.C. issued an Order in Docket No. 82-576 which prescribed depreciation methods for South Central Bell equipment. The Louisiana Public Service Commission had an opportunity to participate in the hearings which culminated in the formation of the Order.

5) No appeal was filed from the December 30, 1982 Order and it is now final.

6) On January 6, 1983, the F.C.C. released its

Memorandum Opinion and Order adopted December 22, 1982, in CC Docket No. 79-105 which held that the F.C.C.'s depreciation methods preempt inconsistent state depreciation methods and rates. The Order also contained a provision requiring the Secretary of the F.C.C. to serve a copy of the Order on each state commission. According to William J. Tricarico, Secretary of the F.C.C., members of his staff mailed copies of the Order to all state public service commissions, including defendant, on or about January 7, 1983.

7) The Order was published in the Federal Register on January 19, 1983.

8) The testimony of Bruce Louiselle indicates that the Louisiana Public Service Commission had actual knowledge of the F.C.C.'s January 6, 1983 Order and the commission so concedes.

9) The Louisiana Public Service Commission continues to prescribe methods of depreciation other than those prescribed by the F.C.C., the straight line equal life group method. The last official order of the Louisiana Public Service Commission which addresses regulation of depreciation rates for plaintiff's equipment in Louisiana is dated June 30, 1981. It states: "Depreciation rates for imbedded terminal equipment, and all other equipment historically regulated in the intrastate jurisdiction, will be set according to policies approved in this State. They will not be established to further a policy of 'deregulation' of the F.C.C." The Order expresses the intent of the Commission in that it provides that the Order is "issued to set forth the scope of the regulatory authority over telephone tariffs that is exercised, and will continue to be exercised absent a contrary and authoritative judicial order by the Louisiana Public Service Commission."

10) The Louisiana Public Service Commission requires plaintiff to employ a depreciation technique known as Whole Life straight line depreciation. When an asset is acquired, a fixed life is assigned to it and the costs of depreciation are allocated over the assigned period regardless of the actual life of the asset. Recovery of these costs occurs at a slow rate at the beginning of the life of the asset.

11) The technique now prescribed by the F.C.C., the remaining life method, evaluates the remaining life of the assets at specified intervals and the remaining value of the asset is depreciated over its remaining life, regardless of the length of its actual life to date.

12) The remaining life method results in greater recovery of costs early in the life of the asset. The same is true of the straight line equal life group technique.

13) The actual expenses of plaintiff, including costs associated with depreciation of assets, are one factor evaluated by the Louisiana Public Service Commission in determining what rates South Central Bell will be allowed to charge.

14) If depreciation of plaintiff's assets is computed according to the method prescribed by the F.C.C. rather than according to the technique employed by the Louisiana Public Service Commission, its expenses will be substantially increased.

15) The Louisiana Public Service Commission also requires that station connection costs be capitalized, rather than expensed, as required by the F.C.C. Expensing Order.

16) The use of the F.C.C. mandated accounting procedures will result in accelerated depreciation and increased expenses which require an increase in rates. The need for additional revenue originates in the settlement of the government's antitrust action against American Telephone & Telegraph Co. and is one of the "benefits" to the public of the break-up of the Bell System into separate entities.

17) Plaintiff's need for additional cash flow is indisputable and delay in switching to F.C.C. mandated accounting procedures will deny plaintiff the additional cash flow required, thus impairing its financial position and cash flow which it is presently losing because of the actions of the Louisiana Public Service Commission. Such losses are irretrievably lost, even though a rate increase should be granted in the future.

CONCLUSIONS OF LAW

1) The terms of the Federal Communications Act of 1934 expressly grant to the F.C.C. the authority to enter orders effectuating the provisions of the Act, 47 U.S.C. §§ 151, 152(a), 154(i). In the exercise of its authority, the F.C.C. has broad discretionary power, see e.g. *United States v. Southwestern Cable Company* 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968).

2) In keeping with its statutory grant of power, the F.C.C. has held that, under Section 220(b) of the Act, states may not prescribe depreciation rates which are inconsistent with the depreciation rates and policies mandated by the F.C.C., see Memorandum Opinion and Order, CC Docket No. 79-105, January 6, 1983. 48 Fed.Reg. 2324 (1983).

3) The Supremacy Clause of the United States Constitution, Article XI, cl. 2, dictates that federal laws preempt those enacted by the states when the latter are in conflict with the purposes of Congress, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

4) The January 6, 1983 Memorandum Opinion and Order carefully considers the impact of inconsistent state imposed methods of depreciation computation on intrastate communications and concludes that their continued use would frustrate the objectives of Congress expressed in the Federal Communications Act. The order clearly states: "...[W]e find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communication Act and are accordingly void." 48 Fed.Reg. at 2330 (1983) and: "...Since the depreciation method utilized is a material part in determining the rate to be applied, state commissions are also precluded from departing from the depreciation methods prescribed by the Commission. Thus, the *Expensing Order* is binding upon state commissions and they must expense additions to inside wiring in accordance with the plan established therein..." Id., at 2230, and "...Accordingly, we find that this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates." (Id. at 2331).

5) The rulings and orders of administrative agencies carry the full force of federal law and are accorded the same preemptive effect as federal statutes, *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).

6) The Louisiana Public Service Commission continues to require the plaintiff to employ methods of computing depreciation which conflict with those specified by the F.C.C. and, in so doing, are in violation of federal law.

7) Plaintiff asks the court to grant injunctive relief in accordance with the provisions of 47 U.S.C. § 401(b) which allows any party, injured by another person who neglects to comply with any order of the Commission, to ask the court for enforcement of the order through issuance of an injunction.

8)After a hearing, the court "shall enforce obedience to such order by a writ of injunction..." if the court determines that the order was "regularly made and duly served" and that the defendant is acting in violation of the order. 47 U.S.C. § 401(b).

9) The first of the statutory requirements of § 401(b) has already been met, the defendants are clearly acting in defiance of the F.C.C.'s January 6, 1983 Order.

10) Whether the order was regularly made and duly served is an issue which has spawned much dissent between the parties. Defendants admit that the Louisiana Commission actually received a copy of the order but insist that they are entitled to personal service of the order as a prerequisite to being restrained for non-compliance with its terms. Since the Act itself does not specify the manner in which service is to be made, defendants reason that the provisions of the Federal Rules of Civil Procedure, and consequently the Louisiana Code of Civil Procedure, are applicable. Apparently, no other court has yet been called upon to construe these terms. Nonetheless, defendant's argument cannot succeed. The scope of the Federal Rules

of Civil Procedure are expressed in Rule 1, which states that the Rules govern all civil actions in the district courts of the United States. Obviously, proceedings before the F.C.C. are not included in this category. Such a conclusion is further supported by the provisions of 47 U.S.C. § 154(j) which empower the F.C.C. to prescribe its own procedural regulations, *FCC v. Schreiber*, 381 U.S. 279, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965).

11) In the present case the applicable procedural regulations are contained in 47 C.F.R. § 0.445(a)—0.445(e). § 0.445(a) states that "All opinions and orders of the Commission...are mailed to the parties and, as part of the record, are available for inspection...." Subsection (c) further explains that "All rulemaking documents are published in the Federal Register." The effect of compliance with the provisions listed above is described in §0.445(e), which states, inter alia, "If the documents described in paragraphs (a)-(d) of this section are published in the Federal Register, the F.C.C. Reports or Pike and Fischer Radio Regulations, they may be relied upon, used or cited as precedent, by the Commission or private parties in any matter. If they are not so published, they may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission. No person is expected to comply with any requirement or policy of the Commission unless he has actual notice of that requirement or policy or unless a document stating it has been provided in this paragraph."

12) There is absolutely no evidence in the record to indicate that the F.C.C. in any way deviated from the regulations cited above. There is apparently no dispute that the parties to the F.C.C. proceeding which led to

issuance of the January 6, 1983 Order were served in accordance with 47 C.F.R. § 0.445(a). Although the pertinent regulations do not require service of the order on one not a party to the proceeding, the Secretary of the F.C.C. nonetheless served the Louisiana Public Service in keeping with the standard practices followed by the F.C.C. In addition to the fact that the Louisiana Public Service Commission had actual knowledge of the Order, it was also published in the Federal Register. Under these circumstances, the court must conclude that the defendants have failed to rebut the presumption of correctness which attaches to the acts of government officials, *FCC v. Schreiber,* 381 U.S. 279, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965); *Environment Defense Fund, Inc. v. Alexander,* 614 F.2d 474 (5th Cir.1980). Accordingly, the court holds that the F.C.C. acted in accordance with the law an the Order, dated January 6, 1983, CC Docket No. 79-105 was regularly made and duly served for purposes of 47 U.S.C. § 401(b).

13) Finally, the court is called upon to decide what manner of harm must be demonstrated before plaintiff is entitled to invoke the protection of §401(b). Under the terms of the statute itself, only a person injured by the defendant's non-compliance with an F.C.C. order may seek injunctive relief. The question is whether the plaintiff must show mere injury or meet the traditional equitable requirement of irreparable injury, *see Canal Authority v. Callaway,* 489 F.2d 567 (5th Cir.1974). Generally, when the injunction is the "creature of the statute," no showing of irreparable injury is required once the statutory requirements have been met, see e.g. *Hecht v. Bowles,* 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944), *SEC v. Mize,* 615 F.2d 1046 (5th Cir.1980); *UV Industries v. Posner,* 466 F.Supp. 1251 (D.Me.1979).

14) As noted earlier, the actions of the Louisiana Public Service Commission have clearly caused injury to plaintiff. By failing to employ the F.C.C.'s method of computing the rate of depreciation of plaintiff's assets, the defendants were able to justify the decision to deny plaintiff's request for a rate increase. Had F.C.C. policies and rates been used, the substantial increase in expenses reflected would have required that a rate increase be granted in keeping with the policies expressed in the January 6, 1983 Order of the F.C.C. Any rate increase denied in the present cannot be recovered in the future. Under the terms of 401(b), the court is convinced that plaintiff has shown sufficient injury to warrant the issuance of an injunction, as was each of the other district courts to which this issue has been presented. *Southwestern Bell Telephone Comopany v. The State Corporation Commission of the State of Kansas, et al*, C.A. No. 83-7090, (D.C.Kan.1983); *Pacific Northwest Bell Telephone Company v. Washington Utilities and Transportation Commission, et al*, 565 F.Supp. 17 (D.C.Wash.1983); *The Chesapeake and Potomac Company of Maryland v. Public Service Commission of Maryland*, 560 F.Supp. 844 (D.C.Md.1983).

15) Defendant protests that the F.C.C. had suddenly reversed its posture of 40 years and that this court should consider the impact of any rate increase upon the public, especially upon the poor. The answer to defendant's assertion is that it is beyond the power of this court to review the propriety or legality of an order of the Federal Communications Commission since the Congress has vested that jurisdiction only in the court of appeals. 47 U.S.C. § 402; 28 U.S.C. 2342(1).

16) Defendant also asserts that the Johnson Act, 28

U.S.C. § 1342 preludes the court from enjoining it. The Johnson Act provides that: "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order effecting rates chargeable by a public utility and made a State administrative agency or a rate-making body of a State political subdivision, where: (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and (2) The order does not interfere with interstate commerce; and (3) The order has been made after reasonable notice and hearing; and (4) A plain, speedy and efficient remedy may be had in the Courts of such a State." The Johnson Act applies only if *all four* of its enumerated factors exist. *DeKalb County v. Southern Bell Tel. & Tel. Co.*, 358 F.Supp. 498 (N.D.Ga.1972), aff'd 478 F.2d 700 (5th Cir.1973). Here the very first requisite for Johnson Act application is not met. Plaintiff asserts jurisdiction under Section 401(b) of the Communications Act and the preemptive effect of the F.C.C.'s order, not upon any alleged repugnance of the defendant's action to the Constitution. *Chesapeake and Potomac Tel. Co. of Md. v. Public Service Comm. of Md., supra.* Thus the Johnson Act does not bar injunctive relief. Likewise, where the Congress specifically authorizes injunctive relief by a federal court notions of comity between federal and state systems are no longer applicable.

17) Finally, defendant argues that in considering plaintiff's chances for success upon the merits we must consider the circumstances surrounding the F.C.C.'s actions and whether its orders will ultimately be upheld by the courts to which the Congress has entrusted review of the orders. That is simply a request to do indirectly that which the court may not do directly—review action of the F.C.C.

18) The court is not convinced, however, that the scope of the injunction should be as broad as plaintiff has requested. Plaintiff properly asks the court to enjoin the defendants from employing any methods of depreciation which are not in accordance with the January 6, 1983 and December 22, 1982 Orders of the F.C.C. In addition, plaintiff requests that the Louisiana Public Service Commission also be commanded to "issue appropriate orders within seven days permitting South Central Bell to implement, subject to refund with legal interest thereon, tariffs in accordance with the depreciation rates and methods prescribed by the F.C.C." Were such an order to issue, the court would in effect, become directly involved in the rate making process. Indeed, the January 6, 1983 Memorandum Opinion and order clearly recognizes that intrastate rate making is still within the exclusive province of the states. 47 U.S.C. § 152(b) p. 12, paragraph 30. Plaintiff insists that defendant's past activities show that it will not in good faith comply with the order of this court requiring that it follow F.C.C. policies and that the court should state precisely the rate increase to be granted—as the court did in *Pacific Northwest Bell Tel. & Tel. Co. v. Trans. Comm., supra.* While depreciation schedules are an important factor in rate making, they are only one factor among many and this court is not willing to assume in advance that the Louisiana Public Service Commission will not comply, in good faith with the orders of the court. We will follow the procedure of Judge Northrop in the Maryland case and require the defendant to set new rates within ten days utilizing F.C.C. policies and rates.

ON MOTION FOR NEW TRIAL

This matter is before the court upon a motion for new trial filed on behalf of defendant, the Louisiana Public

Service Commission, and upon a motion to modify the order for preliminary injunction which the court previously entered and alternatively for a rule to show cause why the defendant should not be held in contempt, filed on behalf of plaintiff, South Central Bell Telephone Company. This action was initiated by South Central Bell under Section 401(b) of the Federal Communications Act of 1934, 47 U.S.C. § 401(b), seeking injunctive relief requiring the Public Service Commission to adopt accounting procedures which have been prescribed by the Federal Communications Commission for the purpose of fixing intrastate telephone rates. The court heard a motion for preliminary injunction and on June 27, 1983, entered findings of fact and conclusions of law and issued a preliminary injunction requiring that the Public Service Commission abide by the F.C.C. order regarding depreciation rates and methodologies and to "issue an order which provides for the collection of rates by plaintiff sufficient to recover the intrastate revenue requirement resulting from the F.C.C. prescribed depreciation rates and methodologies." Establishment of a refund procedure was directed in case plaintiff should not prevail on the merits of the action. Pursuant to that order, the Public Service Commission on July 7, 1983, issued an order which: (1) reduced South Central Bell's fair rate of return on equity from 13.5% which it had previously set, to 12% and (2) authorized an increase in revenues in the amount of $12,700,000.00.

These motions were then filed and the court heard both motions on July 29, 1983, at the conclusion of which oral findings were made. The motion of the Public Service Commission for new trial was denied and the motion of plaintiff to modify the injunctive order was granted. The Public Service Commission was ordered to increase telephone revenues by an amount sufficient to constitute a total increase in the amount of $40,506,000.00.

This memorandum opinion will serve as further findings and conclusions of law for the court's ruling of July 29, 1983.

The court granted the motion of the Federal Communications Commission to file a memorandum, amicus curiae, in this matter and the court has considered that memorandum along with the other briefs.

I. *Motion for New Trial*

The Public Service Commission's motion for new trial is principally based upon a re-examination of § 401(b) of the Communications Act precipitated by the decision to deny a telephone company request for a temporary restraining order in a similar proceeding pending in the United States District Court for the District of Maine (Civil Action 83-0166-P, New England Telephone and Telegraph Company v. Public Utilities Commission of Maine, et al, unreported). This court expressed to counsel its concern that sufficient consideration had not been given to the proper interpretation of § 401(b) at the time of issuance of the preliminary injunction and specifically requested that counsel brief the question whether that provision authorizes enforcement by a private party of an F.C.C. order such as that here involved. Multiple briefs have been filed by both sides.

On December 22, 1982, the F.C.C. adopted a "memorandum opinion and order," released January 3, 1983, F.C.C. 82-581, Mimco 32609. The F.C.C. had previously adopted revisions in depreciation methods and an order requiring expensing, instead of capitalizing, "inside wiring" costs of making station connections. In its January 3, 1983 order, the F.C.C., reversing forty years of its own precedent, as counsel for the Public Service Commission has pointed out, held

that under the provisions of the Communications Act, all state regulatory depreciation rules in conflict with F.C.C., methodologies are pre-empted by the F.C.C. orders. The Public Service Commission rules do not comply with F.C.C. accounting procedures and the Public Service Commission has refused to permit South Central Bell to utilize F.C.C. procedures for intrastate operations.

Telephone companies are subject to regulation both by state commissions for intrastate operations and the Federal Communications Commission for interstate operations.

The F.C.C.'s change in accounting procedures converts "inside wiring" costs of making telephone connections to residences and businesses from a depreciable capital asset to an expense and increases the amounts allowed as depreciation of telephone company plant and equipment. The practical effect of these changes is to increase the operating expenses which the telephone company is allowed to charge off, thus generating the need for additional revenues to cover operating costs. The Public Service Commission does not agree that these changes are desirable, particularly because institution of these changes and the related increased operating costs mandates an increase in revenues, hence an increase in the cost to telephone subscribers. This court is not, and can not become involved in the question of whether the F.C.C.'s approach is correct. The Congress has specifically provided that no district court has authority to review or otherwise determine the validity of an F.C.C. order; the courts of appeals have exclusive jurisdiction to review final orders of the F.C.C.. 47 U.S.C. § 402; 28 U.S.C. § 2342[1]. The parties have informed the court that the validity of the F.C.C. order is on review at this time in the United States Court

Appeals for the Fourth Circuit; this court, however, can entertain no challenge to that order and must accept and apply it.

No one idsputes that this is a final order of the F.C.C.—the issue is whether it may be enforced by a private party under § 401(b) against the Public Service Commission. That section reads, in pertinent part as follows:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money ... the Commission or any party injured thereby, or the United States ... may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process...

Counsel for the Public Service Commission concedes in brief and oral argument that the F.C.C. could issue an order specifically telling all state regulatory agencies to comply with the revised accounting procedures and that such an order would be enforceable under § 401(b) even though the Public Service Commission was not specifically named therein and had not participated in the administrative proceedings. Counsel argues, however, that the January 3, 1983 F.C.C. order is merely a legal opinion issued by the F.C.C. interpreting the provisions of the Communications Act of 1934, that it does not specifically order the state commissions to do anything and, as such, the order is not enforceable under § 401(b), although it might be enforceable by the United States at the request of the

F.C.C. under § 401(a). The narrow issue then is whether this particular F.C.C. order, by its terms, requires that all state regulatory bodies comply and adopt the F.C.C. accounting procedures.

The January 3, 1983 order does contain an extensive discussion of what the F.C.C. considers to be the applicable law and does conclude that the F.C.C.'s prior construction of the Communications Act was in error. Under the "declaratory ruling" portion of the order however, the F.C.C. states:

> " ... The purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists... In this case, it appears necessary to issue such a ruling to *clarify for the state commissions* and the carriers the effect of our depreciation prescriptions... Thus, we find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void..." (January 6, 1983 order, paragraph 43, page 16 emphasis supplied).

This court can construe the above quoted language in no other fashion than as a direct order for the guidance of state commissions, specifically declaring that inconsistent state prescribed depreciation rates are void. The January 3, 1983 order closes with four "ordering" clauses, one of which directs the secretary to cause a copy to be served on each state commission. There is no "ordering clause" specifically directing each state regulatory agency to comply with the provisions of the F.C.C. order, but this court concludes that the order nevertheless is plainly directed to all state regulatory bodies and plainly declares that their depreciation procedures must comply with

F.C.C. procedures. It is thus an "order of the Commission other than for the payment of money" and may be enforced under § 401(b) against any person who "fails or neglects to obey" by any party injured thereby. This court has previously determined that the F.C.C. order was "regularly made and duly served" and that the Public Service Commission, by failing to comply with it has failed or neglected to obey it and thus is "in disobedience of the same." Under these circumstances, the Congress has stipulated that "the court shall enforce obedience to such order by a writ of injunction." For these reasons, the court concludes that the preliminary injunction previously issued herein was properly issued under § 401(b) and the motion for new trial on behalf of the Public Service Commission is denied.

II. *The Motion to Modify Order for Preliminary Injunction*

In its prior rulings in this case, this court has pointed out that it will not become involved in the rate making process and that intrastate rate making is still within the exclusvie province of the states. 47 U.S.C. § 152(b). Accordingly, the court in its original injunctive order did not direct any specific rate increase but simply ordered the Public Service Commission to apply the F.C.C. mandated accounting procedures and to issue an order "which provides for the collection of rates by plaintiff sufficient to recover the intrastate revenue requirement resulting from the F.C.C.-prescribed depreciation rates and methodologies."

The last rate increase granted to South Central Bell by the Public Service Commission was in 1981. In the course of that proceeding, the Public Service Commission, after receiving extensive testimony fixed a fair rate of return on equity at 13.5%. In 1982 South Central Bell filed

another request for increase in rates in the amount of $238,000,000.00. During the course of that proceeding, the Public Service Commission determined that application of the F.C.C. mandated accounting procedures would increase South Central Bell's expense level by $40,506,000.00. The Public Service Commission declined to allow South Central Bell to utilize the F.C.C. procedures for intrastate operations and denied the request for increased rates on May 19, 1983.

In its July 7, 1983 order, the Public Service Commission confirms that application of the F.C.C. depreciation rates would cause South Central Bell's intrastate operating costs to increase in the amount of $40,506,000.00. In response to the preliminary injunction issued June 27, 1983 the Public Service Commission did not order an increase in revenues sufficient to cover the increase in expenses. Although no evidence was received upon any matter, the Public Service Commission simply reduced South Central Bell's fair rate of return on equity from the 13.5% previously fixed by the Public Service Commission itself to 12%. This action reduced the increase in revenues required by the company from $40,506,000.00 to $12,700,000.00. This determination was made without the benefit of receiving any evidence and with no attempt to justify a revision in the previously established rate of return.

In the July 7, 1983 order, the Public Service Commission declares that because no increase in revenues was required, the May 19, 1983 order did not determine a rate of return. This court finds that the May 19, 1983 order did not refuse the company's request for South Central Bell's request for an increase predicated upon reduction in the rate of return. On the contrary, the May 19, 1983 order specifically states, "Since the Company has earned a rate

of return comparable to that found to be reasonable by the Commission in the last rate proceeding, we find no justification for an increase in rates at this time." That finding is, very clearly a reiteration in 1983 that the rate of return established in 1981 is still in effect. Since the Commission received no evidence on this or any other subject in connection with issuing its July 7, 1983 order, the Commission had absolutely no justification for failing to order an increase in revenues sufficient to cover the increased operating costs of the company. This court will not become involved in the determination of the fair rate of return on equity which South Central Bell should have. That is a matter for the Public Service Commission, predicated upon proper and sufficient evidence, and, upon review, by the courts of Louisiana.

The Public Service Commission, here has not complied with the order of this court. The Public Service Commission itself has determined that there is an increase in operating expenses of $40,506,000.00 and, unless there are reasonable and proper adjustments to be made, that increase in operating costs mandates an equivalent increase in revenues. Adjusting fair return on equity downward, in the absence of evidence justifying such an adjustment, was arbitrary and capricious—a simple exercise in arit! metic designed to minimize the increase in telephone rates. The Public Service Commission here has declined to perform its rate making duties and its response to the court's preliminary injunction leaves the court no alternative but to accept the Commission's finding that South Central Bell has increased operating costs of $40,506,000.00. Having accepted that determination, the court must require the Public Service Commission to "issue an order which provides for the collection of rates by plaintiff sufficient to recover the intrasate revenue requirement resulting from

the F.C.C.-prescribed depreciation rates and methodologies." That increase has been determined by the Public Service Commission itself to be $40,506,000.00 and, since this court will not engage in rate making, that is the increase which the Public Service Commission must authorize.

For these reasons, the motion to modify the preliminary injunction is hereby GRANTED and the Public Service Commission will be ordered to grant an increase in revenues to South Central Bell which will cover South Central Bell's increase in operating costs of $40,506,000.00.